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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1078

VACU-MATIC CARBURETOR COMPANY,
a corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinion of the Court Below	2
Statement of the Case	2
Description of the Vacu-Matic Device	4
The Evidence	6
The Findings of the Commission	8
The Statute Involved	9
The Questions Presented	10
Reasons Relied on For Allowance of the Writ	13
Prayer for the Writ	18
Brief in Support of Petition for Writ of Certiorari	19
Opinion of the Court Below	19
Statement of the Grounds on Which Jurisdiction Is Invoked	19
Statement of the Case	20
Specification of Errors Intended to Be Urged	20
Summary of the Argument	23
Argument	30
I. The opinion of the court below demonstrates the necessity for further explanation of the scope of review by courts of appeal of orders of administrative agencies, such as the Federal Trade Commission, and for further and more detailed definition by this Court of the term "substantial evidence"	30

II.

There was no substantial evidence in the record, within the meaning of that term as presently defined by this Court, of the result of the use of the Vacu-Matic instrument when it was actually open and operating 37

III.

The Court of Appeals did not take into consideration the irreconcilable inconsistency in the evidence relied upon by the Commission to support the order under review 41

IV.

The findings and order of the Commission are inconsistent with the evidence 43

V.

The Court of Appeals erred in failing to hold that the Federal Trade Commission may not ignore and refuse to make a finding on material facts appearing in the record 48

VI.

The Court of Appeals erred in approving, under the condition of the record before it, the finding that petitioner's representations possess the tendency to mislead a substantial portion of the purchasing public and in holding that doubtful proof of the tendency to mislead may be considered as sufficient in the face of unanimous testimony by the customers themselves that they were not deceived and that the device operated as represented 51

VII.

The Court of Appeals erred in holding that petitioner received a fair trial before the Commission 54

Conclusion 62

TABLE OF CASES, TEXTS AND STATUTE.

Appalachian Power Co. v. N.L.R.B., 93 Fed. (2d) 985 (CCA—4) 14

Ballston-Stillwater Knitting Co., Inc. v. N.L.R.B., 98 Fed. (2d) 758 (CCA—2) 14

Buchsbaum & Co. v. Federal Trade Commission, 153 Fed. (2d) 85 (CCA—7) 18, 60

Carlay v. Federal Trade Commission, 153 Fed. (2d) 493 15

Chicago, M. & St. P. R. R. v. Carpenter, 125 Ill. App. 306 54

Consolidated Edison Co. v. National Labor Relations Board 305 U. S. 197 ..... 14, 32

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 580 ..... 14, 16, 50

Hauser v. Federal Trade Commission, 4 Fed. (2d) 632 (CCA—7) 15

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91, 93 56

John Bene & Sons, Inc. v. Federal Trade Commission, 299 Fed. (2d) 468 (CCA—2) 56

Kidder Oil Co. v. Federal Trade Commission, 117 Fed. (2d) 892 (CCA—7) 15, 36

Morgan v. United States, 304 U. S. 1, 19, 22 55

National Labor Relations Board v. Columbian Enameling and Stamping Co., 306 U. S. 292 14

National Labor Relations Board v. Thompson Products, Inc., 97 Fed. (2d) 13, 15 (CCA—6).....14, 15, 32, 36

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 290, 304.....55, 62

Ostermoor & Co., Inc. v. Federal Trade Commission, 16 Fed. (2d) 962 (CCA—2) 15, 36

Philip Carey Mfg. Co. v. Federal Trade Commission, 29 Fed. (2d) 49 (CCA—6) 15

THE STATUTE.

Federal Trade Commission Act, Sec. 5 (a), (b); 38 Stat. 717; Title 15 U.S.C.A. Sec. 45 (a) and (b)..... 9

TEXTS.

"The Task of Administrative Law" (Mr. Justice Frankfurter), 75 University of Pennsylvania Law Review, 614, 618 57

"Opinion Evidence in Illinois," King & Pillinger, 322 53

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Vacu-Matic Carburetor Company, a corporation, respectfully prays that the Writ of Certiorari issue to review the Order and Decree of the Circuit Court of Appeals for the Seventh Circuit, entered December 6, 1946, having on December 3, 1946 denied the Petition for Rehearing and having modified its opinion rendered October 22, 1946.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was rendered and filed October 22, 1946, which opinion was modified December 3, 1946, and is reported in 157 Fed. Rep. 2nd Series, Page 711.

Statement of the Case.

The order of the Federal Trade Commission to cease and desist enjoins Petitioner from representing:

(1) That the use of Petitioner's device on an automobile engine will result in quicker starting, faster acceleration or pick-up, increased power, or a smoother running engine.

(2) That the use of such device will result in any reduction of gasoline consumption, or in any increase in mileage per unit of gasoline unless such representation be expressly limited to those cases in which the fuel mixture, due to improper adjustment of the carburetor, is excessively rich and a small amount of additional air may serve to lean such mixture.

(3) That the device performs any useful services in the carburetion of gasoline in an automobile engine in excess of such effect as it may have in leaning the fuel mixture (R. 930).

The original Complaint, issued April 26, 1938, charged Petitioner with unfair methods of competition in commerce in violation of the Federal Trade Commission Act (R. 2). Answer was filed and the cause proceeded to hearing upon the theory, as announced in the original Complaint, that Petitioner had engaged in unfair methods of competition in commerce within the meaning of the Act. At the time of the issuance of the original Com-

plaint, it is to be noted, the Act already had been amended by what has come to be known as the Wheeler-Lea Amendment, Section 5 (a) of which provides that unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce are hereby declared unlawful.* The case proceeded, nevertheless, upon the unfair competition theory. The amended Complaint, issued more than four years after the original Complaint (June 10, 1942), abandoned the unfair competition charge and centered its attack upon the representations of Petitioner which were alleged as possessing the tendency to mislead and deceive, and as actually misleading and deceiving a substantial portion of the purchasing public into the belief that Petitioner's representations were true and into the purchase of substantial quantities of Petitioner's product (R. 31). Prior to the issuance of the Amended Complaint, over 1300 typewritten pages of testimony had been taken, 51 exhibits had been introduced on behalf of the Commission and 14 exhibits on behalf of Petitioner.

By the Order of June 10, 1942, amending the complaint by striking all of the original paragraphs relating to unfair competition, and by inserting similarly numbered paragraphs in the Amended Complaint relating to deceptive acts and practices, Petitioner, and not the Commission, was given leave to introduce evidence in opposition to the Amended Complaint, but the Commission, nevertheless, proceeded to introduce 17 additional exhibits (numbered 55 to 72, inclusive) after which the case was closed (R. 800).

The hearings were conducted by five Trial Examiners, no one of whom had the opportunity to hear all of the witnesses testify on behalf of the parties. Four of them signed the original Examiners' Report (R. 883-892) while only two signed the Supplemental Trial Examiners' Report (R. 913).

On June 29, 1944, more than six years after the issuance of the original complaint, and about eight years after the Commission commenced its investigation of the Vacu-Matic device, the Commission filed its findings as to the facts and conclusions and entered its order to cease and desist (R. 923-930). The Commission found that Petitioner had represented that the use of its device would result in a saving of gasoline of up to 30% and would also result in faster pick-up, more power and greater speed. These representations, the Commission found, were not true, except in those cases where the fuel mixture is too rich, requiring that it be leaned with additional air. The same result, the Commission further found, could be obtained *by proper adjustment of the carburetor* (R. 928). The acts and practices of Petitioner, the Commission decided, were to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act (R. 928). The Order to cease and desist was thereupon entered.

The Vacu-Matic Device.

The Vacu-Matic device is an accessory to an automobile engine consisting of a cylinder which contains a piston resting on a spring. The piston moves, opening and closing the small aperture in the cylinder at different speeds and motor loads, according to the needs of the motor, to permit the entrance of additional air into the combustion chamber. As the motor requires additional air caused by the vacuum, the piston, moving forward, uncovers the hole in the side of the cylinder, allowing additional air to enter. When the automobile achieves the required speed, or, when the sudden demand for pull or power upon the motor is met, the driver's foot lets up on the accelerator or throttle, and the piston in the

Vacu-Matic closes the hole and stops the flow of additional air.

The instrument is usually installed between the carburetor and the intake manifold.

The theory of combustion is based upon combining air and fuel and converting them into a mixture which explodes rather than burns (R. 131). There are three stages of carburetion and three main sources of gas entry into the carburetor. These stages may be designated as the "first," "second" and "third." In the first stage, at idle and at constant speeds, the gasoline enters through the regular jet. The second source of entry is on acceleration when the accelerator pump forces raw gas through the pump discharge nozzle (R. 408). The third source of gasoline entry is on acceleration of speed and power when the power by-pass jet opens and admits additional raw gas into the carburetor. After this last requirement of acceleration in speed and load is satisfied, the power by-pass jet again closes (R. 530). This by-pass jet is controlled by a vacuum with spring and piston exactly like the Vacu-Matic, except that it opens to admit gas while the Vacu-Matic opens to admit air. They open and close at the same time as both are activated by the same vacuum.

The construction of the Vacu-Matic is such that the additional air is introduced into the manifold through eight separate air jets contained in an eccentric chamber, thus causing the air to be introduced in a turbulated effect, aiding in the breakup of the gasoline and resulting in a more explosive mixture within the cylinder (R. 59). In short, the result of the use of the device is the admission of air plus turbulence on acceleration changes of speed and loads.

The Evidence.

The gist of the representations made by Petitioner in its advertisements is that the use of the Vacu-Matic will result in the saving of the consumption of gasoline, in more power, quicker starting and better performance. Petitioner concedes that the representations as evidenced by the various exhibits (R. 841-847, inclusive, and 854-867, inclusive) were made. More than 200,000 Vacu-Matics had been sold to the public prior to 1940 (R. 194).

To prove the falsity of Petitioner's representations, the Commission introduced the testimony of experts or mechanics of greater or less experience and also the testimony of three actual users. In substantiation of its position, Petitioner introduced expert testimony and also the testimony of eight actual users of the device.

All of the actual users who submitted the instrument to the test of day-in and day-out driving, including the witnesses called by the Commission, testified to the satisfactory performance of the Vacu-Matic and to the fact that they were not deceived or misled by Petitioner's representations which were, according to these witnesses, substantially true. (Commission's lay witnesses: R. 120-122; R. 123-125; R. 126). (Petitioner's lay witnesses: R. 144, 149, 153, 157, 160, 163, 180 and 186).

Some of the technical evidence produced by the Commission consisted of the testimony of men who gave opinions from tests made by others (Brooks R. 77-87; Winkler R. 516, 571-574); some from the observation of tests conducted, in part, by themselves. (Bruce R. 66-76;

L. P. Hadd 600-620; Lionel Hadd 622-651; Jordon 667-670; Housberg 676-701); some gave opinions based upon the opinions of other witnesses without ever having seen the device in operation (Smith R. 394-420; Kapp R. 484-511) and some had never even seen the instrument, except upon taking the witness stand or shortly prior thereto. (Smith R. 420; Gebhardt R. 597; Mock R. 587; Knocke R. 757; Shepard R. 780).

As will be pointed out in a necessary but brief analysis of the Commission's evidence in the accompanying Brief, *not a single expert witness for the Commission testified to the result of the use of the Vacu-Matic when the instrument was actually open and operating* under conditions of increased acceleration and pull encountered in ordinary driving which, concededly, called the appliance into operation.

In addition to the testimony of its customer witnesses, Petitioner introduced the expert testimony of Arthur S. Klopf (R. 129) who himself actually conducted road tests (R. 130-132), Irwin Price (R. 165), Henry H. Snelling (R. 369), J. C. Thompson (R. 376) and S. A. Silbermann (R. 381).

The Court of Appeals relied principally upon the testimony given as the result of the tests made by the Bendix-Stromberg Carburetor Company at South Bend, Indiana, referring particularly to the testimony of A. H. Winkler, Research Engineer for the Carburetor Division of the Bendix-Stromberg Company (157 Fed. 2nd, at Page 713). As will be more particularly pointed out in the supporting Brief, Commission's witness, Winkler, testified to an average increase of 1½% in miles per gallon with the use of the Vacu-Matic (R. 563). Winkler testified that the Bendix road tests were for a *"measured mile" at constant speeds* (R. 558); that the Bendix dynamometer tests

were *at constant speeds and loads without acceleration* (R. 532-537), a different load being made for each speed and *the dynamometer load being predetermined,* (R. 532) and that so far as the flow bench tests were concerned, *he did not know whether, when these tests were made, the device was open or closed* (R. 554). The 1½% saving with the Vacu-Matic device installed, over the entire range testified to by Winkler, was due to air leakage through the Vacu-Matic device when it was closed (R. 554), leaving open to conjecture, so far as this testimony is concerned, the average increase had the Vacu-Matic been open and operating.

The charts made by the Bendix-Stromberg employees which furnished the foundation for Winkler's opinion were computed or calculated with the use and application of a formula or constant obtained from an unknown source. The propriety of its application was not proved and there was no proof that the formula or constant was itself correct (R. 617).

The Findings of the Commission.

The Commission found that Petitioner in the conduct of its business had made various representations to prospective purchasers with respect to the efficacy and effect of the use of the device, which representations were found to have the tendency and capacity to mislead and to cause a substantial portion of the purchasing public to purchase substantial quantities of the device as the result of an erroneous belief engendered by Petitioner's advertisements, and found that (R. 928):

> "The only cases in which respondent's device will affect the consumption of gasoline are those in which the fuel mixture, due to improper adjustment of the carburetor, is excessively rich (that is, contains too

much gasoline in proportion to the amount of air). In such cases the small amount of additional air admitted by the device may serve to 'lean' the mixture and thereby reduce to some extent the amount of gasoline consumed. *The same result could be obtained by proper adjustment of the carburetor.*"

Based upon its findings, the Commission entered the Order to cease and desist (*supra* 2).

The Commission's own evidence disclosed that carburetors are not adjustable either as to gasoline or air, one of its witnesses specifically testifying that:

"The amount of air is determined when the carburetor is designed,"

and that increased air could only be provided by drilling new holes in the carburetor (R. 428-429). In the tests conducted by the Bendix-Stromberg Company, upon which the Court of Appeals below relied, the carburetor used was not a standard instrument but was one which had been taken apart, adjusted for highest efficiency, the regular jet removed and a .058 jet installed for maximum results for part throttle work and a .060 jet installed for full throttle work (R. 836), a procedure obviously impossible by a car owner. The fairness and propriety of submitting the Vacu-Matic to a test under such circumstances will be discussed in the supporting brief.

The Statute Involved.

Federal Trade Commission Act, 38 Stat., 717; 52 Stat. Ill., Section 5; 15 U. S. C. A., Sec. 45 (a) and (b):

"(a) and (b) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts

to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

The Questions Presented.

I.

A. Does the decision of the Court of Appeals below demonstrate the necessity for further explanation of the scope of review of courts of appeal as to the orders of federal administrative agencies, such as the Federal Trade Commission, and for further and more detailed definition by this Court of the term "substantial evidence"?

B. Did the Court of Appeals follow the decisions of this Court as to the requirement that there be substantial evidence to support the necessary findings and the order to cease and desist, under the present definition of "substantial evidence" as contained in the opinions of this Court?

C. May a Court of Appeals conclude, according to its opinion, that in contemplation of the entire Record, the Commission could have decided the other way and that the Court, if it had the right to weigh and consider the evidence, would or might have decided the issues against the Commission, and at the same time hold that the findings and order of the Commission were sustained by substantial evidence?

II.

Was there substantial evidence in the Record within the meaning of the term as presently defined by this Court, especially in view of the fact that there was no evidence whatsoever as to the result of the use of the Vacu-Matic instrument when it was actually open and operating?

III.

Is there in this Record irreconcilable inconsistency in the evidence relied upon by the Commission to support the findings and the order to cease and desist?

IV.

Are the findings and the order of the Commission inconsistent with the evidence, the findings being based upon an adjustability of the carburetor and the evidence proving that carburetors are not adjustable?

V.

May an order to cease and desist be predicated upon a tendency to mislead in the face of the unanimous testimony by all the customers called as witnesses, both by the Commission and Petitioner, that they were not deceived and that the device operated as represented?

VI.

May the Federal Trade Commission ignore, and fail to make any finding upon the unanimous testimony of all of the actual users called as witnesses both by the Commission and by Petitioner, who testified to the efficiency of the Vacu-Matic appliance and the truth of Petitioner's representations with reference thereto?

VII.

Did the Court of Appeals err in holding that Petitioner received a fair trial within the meaning of the Constitution of the United States and the decisions of this Court, in the proceedings before the Commission? This question may be sub-divided as follows:

(a) Is the receipt in evidence of opinion testimony of witnesses, who base their opinions upon the opinions of other witnesses, error, in that such admission in evidence fails to comply with the standards of trial procedure in federal courts?

(b) Is the receipt in evidence of opinions by witnesses who base their opinions upon a reading of such parts of the Record as were suggested by the Commission and its counsel for them to read, error, in that such admission in evidence fails to comply with the standards of trial procedure in federal courts.

(c) Is the receipt in evidence of opinion testimony by witnesses who have never observed the Vacu-Matic, or any other similar instrument in action, and who saw the Vacu-Matic for the first time when, or shortly before, they took the witness stand, error, in that such admission in evidence fails to comply with the standards of trial procedure in federal courts?

(d) Does the receipt in evidence of charts or graphs which are computed or calculated with the aid of a

so-called "constant," the source of which and the correctness of which were not even attempted to be proved, constitute error, in that such admission in evidence fails to comply with the standards of trial procedure in federal courts?

(e) May the Commission completely disregard the admittedly credible and undisputed testimony of its own and of Petitioner's witnesses who actually used the Vacu-Matic in day-in and day-out driving, and may the Commission neglect, refuse or fail to make any finding upon such unanimous testimony? Does such procedure conform to the requisites of fair trial and the standards of trial procedure in Federal Courts?

(f) Do the proceedings before the Commission amount to fair trial when the evidence is heard by five different trial examiners who heard different portions of the evidence, not one of whom was familiar with the entire Record?

Reasons Relied On for the Allowance of the Writ.

(1) The Court of Appeals for the Seventh Circuit, as is evident from its opinion, did not understand or if it understood, did not follow, the decisions of this Court as to the necessity for substantial evidence to support the findings and orders of administrative agencies such as the Federal Trade Commission. The decision demonstrates the necessity of further defining and explaining the scope of review by courts of appeal and the meaning of the broad and general term "substantial evidence."

(2) The decision below, and the reasons therefor, are in conflict with the decisions of this Court as to the scope of review by courts of appeal of orders of administrative agencies, such as the Federal Trade Commission, this Court having decided that courts of appeal have the power to examine the whole record and ascer-

tain for themselves whether or not the issues presented, from the standpoint of all of the evidence, are supported.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568.

(3) The opinion of the Court of Appeals, on its face, shows that there was not, in the record, substantial evidence as defined and explained by the decisions of this Court, in support of the necessary findings of the Commission upon which its order to cease and desist is based. This Court has held that substantial evidence is such evidence as a reasonable mind will accept as adequate to support a conclusion.

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197;

National Labor Relations Board v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292.

The same rule is announced in somewhat different language in other circuit courts of appeal which define substantial evidence as implying a quality of proof "which induces conviction and makes an impression on reason."

National Labor Relations Board v. *Thompson Products, Inc.*, 97 Fed. 2nd, 13, (CCA 6);

Ballston-Stillwater Knitting Co., Inc. v. *N. L. R. B.*, 98 Fed. (2d) 758 (CCA-2);

Appalachian Power Co. v. *N. L. R. B.*, 93 Fed. 2nd, 985 (CCA-4).

It is plain from the opinion of the court below that the evidence did not make a lasting impression or induce conviction in the mind of that court, the opinion stating that if it was within the province of the Court to weigh and reconcile the conflicting evidence, "we think we might reach a contrary result."

(4) The opinion of the court below is in conflict with the opinions of other Circuit Courts of Appeal as to

the meaning of "substantial evidence" and as to the nature of the burden of proof imposed upon the Commission to sustain its order by findings based upon evidence *which must include all the facts necessary to support the Commission's Complaint.*

Philip Carey Mfg. Co. v. *Federal Trade Commission*, 29 Fed. (2d) 49 (CCA 6);

Ostermoor & Co., Inc. v. *Federal Trade Commission*, 16 Fed. 2nd 962 (CCA-2);

National Labor Relations Board v. *Thompson Products, Inc.*, 97 Fed. 2d, 13 (CCA-6).

(5) The opinion of the Court below is in conflict with other decisions, factually similar, in the same Seventh Circuit.

Kidder Oil Co. v. *Federal Trade Commission*, 117 Fed. 2nd, 892 (CCA-7);

Hauser v. *Federal Trade Commission*, 4 Fed. 2nd 632 (CCA-7);

Carlay Company v. *Federal Trade Commission* 153 Fed. (2d) 493.

In the *Kidder Oil* case, the court examined the evidence and held that the great weight thereof was against the Commission's contentions. The court further held that tests and experiments, such as were conducted in the instant case, must be such as demonstrate *"at least to a reasonable certainty, the validity of the charge which it had the burden of sustaining."*

(6) Because of the condition of the opinions of the courts of appeal in various circuits, it is necessary for this Court to announce whether or not a federal administrative agency, such as the Federal Trade Commission, must support its complaint by sustaining the burden of proof *and whether such agency may itself finally decide*

that it has sustained such burden, its decision in this respect being unreviewable by any legally constituted court of appeal.

(7) The decision of the court of appeals below, is in conflict with the opinions of this Court in that the court below failed to notice the failure of the Commission to make findings on certain material and uncontradicted evidence, this Court having held that courts of appeal have the power to examine the whole record and ascertain whether there are material facts not reported by the Commission, and that if there be substantial evidence relating to such facts, from which some different conclusion reasonably may be drawn, the matter should be remanded to the Commission with directions to make additional findings. *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S., 568.

All of the actual users called as witnesses, both by Commission and Petitioner, testified to the efficacy of the Vacu-Matic in ordinary driving and under ordinary driving conditions and as to the truth of Petitioner's representations. This was not noticed, reported or found by the Commission.

(8) It is sometimes said that the Commission need not establish actual deception, but may rely upon the tendency or capacity to deceive an advertiser's representations. It is necessary for this Court to decide whether or not the Commission may rely upon such alleged tendency to deceive in the face of, and contrary to, the testimony of all of the purchasers called as witnesses, both by the Commission and by the respondent to its complaint, and this Court should decide whether, after such testimony has been received, the case passes beyond the question as to whether or not the advertiser's statements have a tendency adversely to influence buyers of the product. No rule upon this subject has, as yet, been announced by this Court. The case relied upon by the Commission

in this respect is *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67. It is necessary for this Court to point out that in that case Mr. Justice Cardozo expressly noticed that the evidence "as to the fact of confusion and its consequences" was "ample" (291 U. S. 67, 77).

(9) The proceedings before the Commission, which were sanctioned by the Court of Appeals below, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. This departure consisted of (1) the receipt in evidence of unqualified opinion testimony; (2) the receipt in evidence "of hearsay opinions"; (3) the receipt in evidence of charts and graphs calculated by means of a constant or formula as to which there was no evidentiary proof or foundation as to its correctness or applicability, and (4) the complete disregard of the credible, unanimous testimony of every customer witness called by both parties.

Proceedings before the federal agencies, such as the Federal Trade Commission, have become so numerous and cover such a wide area of the field of federal litigation that it is important that this Court condemn such practices and proceedings as occurred before the Commission in the instant case and issue a timely and needed word of admonition.

(10) It is necessary for this Court to decide whether or not hearings may be conducted before the Federal Trade Commission and other similar agencies at different times before five Trial Examiners, no one of whom hears all of the evidence, and to decide, furthermore, whether such procedure, whether or not objected to by a respondent, and whether or not particular prejudice can be shown, constitutes fair trial and due process. This is a situation which calls for an opinion by this Court.

The Court of Appeals for the Seventh Circuit condemned this practice under somewhat similar circumstances. (*Buchsbaum & Co.* v. *Federal Trade Commission*, 153 Fed. 2nd, 85, CCA-7, May 6, 1946).

(11) This Court in its opinions, other courts in their opinions, and the Justices of this Court in legal papers, have recognized and pointed out the dangers of the abandonment of legal standards in proceedings before administrative agencies, and have insisted upon the observance of the essential safeguards and appropriate rules of evidence by which rights are asserted or defended. These safeguards, one of the learned justices has said, must be "institutionalized." Because of the development of administrative law and proceedings, conducted as they frequently are by men uninfluenced by legal tradition and sometimes scornful or impatient of ordinary judicial processes, it is necessary for this Court with some frequency to re-state the standards and rules of procedure which must be observed and followed by such agencies in the exercise of their judicial or quasi-judicial functions, and it is likewise necessary for this Court to re-define the boundaries of permissible review by Courts of Appeal. The instant case presents a sharp example of the necessity for review by this Court.

Wherefore, your Petitioner respectfully prays that the Writ of Certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Seventh Circuit and the order to cease and desist of the Federal Trade Commission, and Petitioner further prays that said decree and said order be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1946

No.

VACU-MATIC CARBURETOR COMPANY,
a corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the court below was rendered and filed, as modified, December 3, 1946, and is reported in 157 Fed. Rep. 2nd Series, at page 711.

Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction is invoked under Section 240 of the Judicial Code, as amended; United States Code, Title 28, Section 347.

Statement of the Case.

To avoid repetition, the Statement of the Case in the Petition for the Writ of Certiorari in support of which this brief is filed, is hereby adopted. Such other facts as are necessary to be considered by the Court in connection with the questions raised on this application, will be pointed out, with record page references, at the proper places in the ensuing argument.

Specification of Errors Intended to Be Urged.

1. The Court of Appeals erred in failing to follow and conform to the decisions of this Court indicating the scope of review of courts of appeal as to orders of the Federal Trade Commission.

2. The Court of Appeals erred in failing to follow the decisions of this Court as to the requirement that there be substantial evidence to support the necessary findings and to support the order to cease and desist, under the definition of "substantial evidence" as contained in the opinions of this Court.

3. The opinion of the Court of Appeals is inconsistent in holding that there was some substantial evidence to support the findings and order of the Commission and at the same time holding that the Commission could have madt a contrary finding, and that, if it was within the province of the court to consider the evidence, it might reach a contrary result; thus disclosing the basic relief of the Court that the Commission had not sustained the burden of proof.

These errors (1, 2 and 3) *demonstrate the necessity for further explanation of the scope of review in such cases, and for further and more detailed definition by this Court of the term "substantial evidence."*

4. In contemplation of the entire record, there was no substantial evidence properly admitted in accordance with the fundamental standards of procedure, supporting the findings of the Commission and its order to cease and desist, and the Court below erred in failing to hold that there was no such substantial evidence.

5. The Court of Appeals erred in failing to hold that the Federal Trade Commission may not ignore and fail to make findings upon the unanimous testimony of all actual users of the device in question who were called as witnesses both by the Commission and by Petitioner, and who testified to the efficacy of the appliance and the truth of Petitioner's representations with reference thereto.

6. The Court erred in failing to hold that it is necessary for the Federal Trade Commission to sustain the burden of proof as to each essential allegation of its complaint and in failing to hold that the Commission cannot itself finally decide that it has sustained such burden.

7. The Court of Appeals erred in holding that it is necessary, only, for the Commission to establish that the challenged advertising representations have the tendency and capacity to mislead and deceive, and in so holding in the face of undisputed, unanimous and affirmative testimony of actual users that they were not deceived.

8. The Court of Appeals erred in holding that Petitioner received a fair trial in the proceedings before the Commission, within the meaning of the Constitution of the United States and the decisions of this Court. This error consisted of:

(a) The approval of the receipt in evidence of opinion testimony of witnesses who based their opinions upon the opinions of other witnesses.

(b) The approval of the admission in evidence of opinions by witnesses who based their opinions upon a reading of such parts of the Record as were suggested by the Commission for their perusal, thus usurping the function of the trier of the facts.

(c) The approval of the admission in evidence of opinion testimony by witnesses who had never observed the Vacu-Matic or any other similar instrument in action, some of whom saw the appliance for the first time when, and some shortly before, they took the witness stand.

(d) The approval of the admission in evidence of charts or graphs which were calculated with the aid of, and based upon, a so-called "constant", the source, correctness and applicability of which were not proved or attempted to be proved.

(e) The approval of the Commission's action in completely disregarding the credible and undisputable testimony of its own and of Petitioner's witnesses who actually used the Vacu-Matic in day-in and day-out, ordinary driving, and the approval of the failure of the Commission to make any finding whatsoever upon such unanimous testimony.

(f) The approval of the conduct of the hearings before five different trial examiners who heard different portions of the evidence, each one of whom was familiar, only, with separate portions of the Record.

SUMMARY OF THE ARGUMENT.

The opinion of the court below demonstrates the necessity for further explanation of the scope of review by courts of appeal of orders of administrative agencies, such as the Federal Trade Commission, and for further and more detailed definition by this Court of the term "substantial evidence."

The court below stated that, on the evidence, a contrary finding by the Commission could have been made and that if it was within the court's province to weigh and reconcile the conflicting evidence it might reach a contrary result.

This conclusion of the Court discloses the basic belief that the Commission had not sustained the burden of proof.

The Commission must support the essential allegations of its complaint by a sustained burden of proof and the Commission itself cannot be its own judge as to whether or not it has sustained such burden.

The Court of Appeals, in concluding that there was substantial evidence to support the Commission, confused that term with "substantial witnesses."

"Substantial evidence" must mean that the evidence, taken as a whole and considered with reference to the relation of each part to the other, substantially supports the Commission's case.

"Substantial evidence", with the Record viewed in its entirety, cannot mean such evidence as permits of the

doubt and uncertainty expressed in the opinion of the court below.

This Court has said that substantial evidence must be such evidence, taken as a whole, as implies a quality of proof which induces conviction and makes an impression on reason. The evidence in the present Record could not have made such an impression on the reason of the court below, if, as it said, it might have decided the case the other way, if permitted so to do.

The word "substantial" itself expresses an indefinable general condition and adds nothing to the word "evidence." There is disagreement, confusion and inconsistency in the opinions of various courts of appeal as to the scope of review of administrative orders. Therefore, this Court should further explain the scope of such review and more sharply define the term "substantial evidence."

The testimony of one witness or a group of witnesses, standing alone and uncontradicted, may be substantial, but loses the quality of substantiality if the Record, taken as a whole, amounts to a contradiction thereof.

II.

There was no substantial evidence in the record of the result of the use of the Vacu-Matic instrument when it was actually open and operating.

The evidence which the Court of Appeals selected as supporting the Commission's case, consisted of tests and experiments with the device in question which did not show the instrument actually open and operating.

It is conceded that the Vacu-Matic appliance works, *i. e.*, opens and closes at different speeds and motor loads ac-

cordingly as acceleration and pulling power is required, as in ordinary driving.

The tests, characterized as convincing by the court below, were all at constant speeds and motor loads, and this is true as to the road tests, the dynamometer tests and the flow bench tests. Not a single portion of the evidence introduced by the Commission at any point in the Record discloses a test of the Vacu-Matic instrument while it was open and operating. From the foregoing the conclusion is inevitable that no fair test was conducted by or on behalf of the Commission.

III.

The Court of Appeals did not take into consideration the irreconcilable inconsistency in the evidence relied upon by the Commission to support the order under review.

The evidence of the Commission was to the effect that the "block test" is the only adequate test, and that the road tests were valueless and, also, that block tests did not show economy and that the road tests did. The evidence of the Commission also showed that neither road tests nor block tests are satisfactory because neither test shows the results of the application of a device as an automobile is driven.

The Commission's evidence showed that the same result accomplished with the use of the Vacu-Matic could be accomplished by adjusting the carburetor, but the Commission's evidence demonstrated that carburetors are not adjustable.

IV.

The findings and order of the Commission are inconsistent with the evidence.

The order under review is based upon the finding that the use of the Vacu-Matic device will not result in any saving of gasoline, but the Stromberg tests upon which the Commission and the court below relied show a 1½% increase in mileage per gallon, with the Vacu-Matic installed through the mere clearance leakage in the Vacu-Matic valve.

The order is predicated upon the finding that the same result can be accomplished by the installation of the Vacu-Matic as can be accomplished by proper adjustment of the carburetor. But, according to the Commission's evidence, carburetors are not adjustable either for air or gasoline.

The carburetor used in the tests at South Bend upon which the Commission and the court below relied was equipped at different times with two separate jets, one for part throttle operation and one for full throttle operation, thus attempting to achieve maximum efficiency without the Vacu-Matic and before the installation of the Vacu-Matic. No carburetors on cars sold to and driven by the public are or can be so equipped.

V.

The Court of Appeals erred in failing to hold that the Federal Trade Commission may not ignore and refuse to make a finding on material facts appearing in the record.

No evidence whasoever to the effect that the Vacu-Matic device, on ordinary cars, in ordinary condition, driven by ordinary drivers and used in day-in and day-out driving, does not substantially perform according to the seller's representations.

Over 200,000 Vacu-Matic appliances had been sold to the public by the year 1940. Not one buyer testified to deception or that the instrument did not work as represented.

All of the actual customer-users, called both by the Commission and by Petitioner, testified to the efficiency of the Vacu-Matic and to the fact that it worked substantially as represented by Petitioner.

This evidence was relevant and substantial and a finding should have been made upon it. No finding upon, or even an allusion to, this evidence, appears in this testimony as to the findings of the Commission.

This Court has ruled that fact finding bodies such as the Federal Trade Commission, must make findings upon substantial evidence bearing upon the issues.

VI.

The Court of Appeals erred in approving, under the condition of the record before it, the finding that petitioner's representations possess the tendency to mislead a substantial portion of the purchasing public and in holding that doubtful proof of the tendency to mislead may be considered as sufficient, in the face of unanimous testimony by the customers themselves that they were not deceived and that the device operated as represented.

This Court should announce the rule as to whether or not an order to cease and desist may be based upon a doubtful finding of a so-called tendency to deceive in the face of the affirmative testimony of all of the actual users called as witnesses that they were not deceived and that the instrument worked substantially as represented.

VII.

The Court of Appeals erred in holding that petitioner received a fair trial before the Commission.

The hearings were conducted by five different Trial Examiners, each of whom heard separate portions of the Record and no one of whom was familiar with the entire Record. The Court of Appeals for the Seventh Circuit itself has held that a trial *de novo* should be granted under similar circumstances.

The practice of substituting Trial Examiners to the extent shown in the instant case should be disapproved by this Court since such repeated substitution destroys consistency and uniformity of rulings on the evidence.

The Court of Appeals approved the admission in evidence of testimony which violated the most fundamental rules of evidence and the most fundamental concepts of fair trial.

Experts were allowed to give opinions based upon tests conducted by others.

Experts were allowed to give opinions based upon the opinions of other experts who had previously testified.

Experts were allowed to give opinions when they had never seen the Vacu-Matic or any similar instrument in operation.

Experts were allowed to testify who had not seen the Vacu-Matic before, taking the witness stand.

Experts were allowed to testify from a reading of such portions of the Record as were directed to their attention by the Commission, thus usurping the functions of the trier of facts.

The Bendix-Stromberg tests at South Bend to which Court of Appeals alludes in its opinion, were computed by the aid of a formula or constant. There was no evidence as to the correctness or applicability of such constant, or to the fact that it was used and accepted by engineers in the task of calculating the results of experiments such as were attempted to be conducted by the Bendix-Stromberg Carburetor Company.

The fact that tests were conducted at the plant of a "big name" manufacturer, does not establish that its employees who conducted the tests possessed expert qualifications.

The evidence shows that these so-called experts were mechanics of doubtful ability and experience.

ARGUMENT.

I.

The opinion of the court below demonstrates the necessity for further explanation of the scope of review by courts of appeal of orders of administrative agencies, such as the Federal Trade Commission, and for further and more detailed definition by this Court of the term "substantial evidence".

In its opinion, the court below said, (157 Fed. 2nd, 711, at page 713):

> "No doubt, on the basis of this Record, a contrary finding by the Commission could have been made. *Furthermore, if it was within our province to weigh and reconcile the conflicting evidence, we think we might reach a contrary result.*" (Italics supplied.)

This language followed a statement in the opinion to the effect that the Court had examined the testimony of the witnesses and was convinced that it was enough to support the challenged findings.

The Court of Appeals had the same cold record before it as the Commission had when that body came to make its findings. The members of the Commission did not see or hear the witnesses, nor did they have any other of the usual opportunities of triers of the facts for observation during the progress of the trial which have been traditionally asserted by the courts as the reason for hesitancy in disturbing the findings of the fact finders.

In view of the doubt expressed in its own opinion as to the substantiality of the Commission's case, it is plain that the court below could not have meant that the Commission sustained the burden of proof to the satisfaction of the court itself, and especially must this be so if, after presumably examining the entire Record, the court "thought it might reach a contrary result" if permitted by law so to do. Whether or not substantial evidence supports necessary findings must be ascertained from the consideration of all of the evidence. This Court has repeatedly said that reviewing courts "must" have the power to examine the whole record and ascertain for themselves the issues presented and, as well, whether the Commission's position on such issues is supported by substantial evidence.

A dangerous theory has been advanced by the Commission which has somehow found favor in the courts to the effect that the Commission can pick the witnesses it chooses to rely upon, even among its own, and that no court can be permitted to question such selection or to examine into the reliability of such witnesses. If this be so, it would be difficult, indeed, for any reviewing court to ascertain the presence or absence of "substantial evidence."

There would seem to be no doubt that, according to ordinary legal standards which must be observed by such agencies, the Commission must sustain the burden of proof as to each essential allegation of its complaint by substantial evidence. The question immediately arises, is the Commission the sole judge as to whether or not it has sustained that burden. According to the Commission, if there be any evidence, which the Commission decides is credible, tending to establish its findings, that is enough to sustain the burden of proof no matter

how overwhelming the evidence may be to the contrary. In other words, a reviewing court has only to open the record, look at the testimony of the first witness for the Commission, close the book, and affirm the order. Then of what avail is it for the court to examine the entire record?

According to the law as now announced by this Court, the findings of administrative bodies must be supported by evidence which is substantial, "that is affording a substantial basis of fact from which the fact in issue can reasonably be inferred." Substantial evidence, this Court has said, "is more than a scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 229, 230; *National Labor Relations Board* v. *Columbian Enameling and Stamping Company*, 306 U. S. 292, 299. Moreover, this Court has approved the opinions of other courts which have stated that substantial evidence "implies a quality of proof which induces conviction and makes an impression on reason." It means,

> "that the one weighing the evidence takes into consideration *all the facts* presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, *considering them in their entirety and relation to each other, arrives at a fixed conviction.*"

National Labor Relations Board v. *Thompson Products, Inc.*, 97 Fed. 2nd 13, 15 (C.C.A. 6); *approved by this Court in Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

In *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 Fed. 2nd, 13, the Court of Appeals said, further:

> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

Language, written or oral, is the attempt of one mind to present to another mind, in terms of visual or sound symbols, an idea. Sometimes the effor is unavailing and frequently incomplete or otherwise inadequate. Perhaps more difficulty is encountered in the use of adjectives and adverbs than in the case of specific nouns and verbs. When the court below concluded that there was "substantial evidence" in the record to support the Commission's order, it was not following or complying with this Court's present definition and explanation of that term. This conclusion is inescapable in view of the approved language of the Court of Appeals for the Sixth Circuit, to the effect that substantial evidence implies a quality of proof which induces conviction and must be found from a consideration of all of the evidence considered in its entirety and in relation to the various parts or portions of the record. The court below, according to its opinion, considered, particularly, one portion of the Commission's evidence, *i. e.*, the testimony respecting the tests made by the Bendix-Stromberg Carburetor Company, the utter unreliability of which will be discussed at a later portion of this brief.

The word "substantial" adds little to the word "evidence." Like other adjectives and most adverbs, the attempt at description adds one generality to another in seeking to describe that which is necessarily abstract or hypothetical. The ordinary generality becomes, thus, a glittering one.

Although, it is believed, the Court below did not follow the admonition of this Court which requires the con-

sideration of the entire record and the presence of such evidence "as makes an impression on reason", complete frankness requires Petitioner plainly to state that this Court itself should give further consideration to the subject in an effort to avoid, if possible, the confusion resulting from the use of language, itself general and broad, in attempted explanation of an already existing generality. It is respectfully urged that to say that substantial evidence means more than a "scintilla" is to refer to something which is itself non-existent. What is a "scintilla"? And to say that substantial evidence implies a quality of proof "which induces conviction and makes a lasting impression on reason", is again to revert to the indescribable in an attempt at description.

Appellate Courts have been flagged away from a general review of such cases by the exhortation that they must not weigh the evidence. But, it is submitted, consideration of the evidence is not only allowed, but commanded. They are permitted, also, to ascertain whether or not the finder of the facts has considered all the facts presented to him and, after such consideration, has arrived at a fixed conviction. When the court below said that on the basis of the record a contrary finding by the Commission could have been made, it was admitting that the finder of the facts, in this case the Commission, had not taken into consideration all of the facts presented to it *and that the Court of Appeals itself had not arrived at a fixed conviction.*

With the growth and development of administrative quasi-judicial proceedings, there have been set up certain danger signals against encroachments by courts of law, warning them away from interfering both with the trial processes and the ultimate conclusions of these bodies. Such federal agencies have been designated as

"fact finding" bodies whose special skill in the scope of their particular field of jurisdiction is presumed to exceed the fact-finding capacities of mere courts of law. It has been said that courts are even barred from considering whether or not a particular result was achieved by the exercise of this special skill, and thus another presumption has developed that such agencies are invariably and consistently skillful in their search for, and their conclusions upon, the evidence. The findings of these agencies have been regarded as just as unassailable as the findings of a jury, or a trial judge, or a master, but it has been forgotten that the findings of an administrative body in the exercise of its judicial function are made in connection with a prosecution or proceeding which it itself has instituted in the pursuit of its enforcement powers, while a judge, jury or master is impartial. It has been forgotten, also, that the hearings are conducted and sometimes recommendations made by hearing officers appointed for periods of varying duration who are not always as fitted, either by experience or mental capacity, as regular federal judges. They are not impressed, indeed they are frequently impatient, of the tenets and traditions of fair trial. Courts of appeal, walk falteringly around the field of facts, not daring to climb the enclosing fences, contenting themselves with a quick look at the outer edges of the proof. This is what the court below did in the case at bar.

The hesitant opinion of the court indicates the presence of one of two conclusions: Either the court did not understand the rulings of this Court as to its scope of review and as to the meaning of substantial evidence, or the existing explanations of the scope of review and definitions of the term substantial evidence are incomplete or otherwise inadequate. The confusion existing

in the minds of the judges of federal appellate courts is apparent.

In *N. L. R. B.* v. *Thompson Products, Inc.*, 97 Fed. 2nd 13, (C.C.A.-6) the Court announced what the weighing process by the trier of the facts must be and held that federal fact-finding agencies must "weigh" and consider all of the evidence in its totality. This gives rise to the rather anomalous conclusion that, while an appellate court may not itself weigh the evidence, it may ascertain whether the Commission has conducted a proper weighing operation.

In *Ostermoor & Co., Inc.* v. *Federal Trade Commission*, 16 Fed. 2nd, 962 (C.C.A. 2), the reviewing court considered the effect of certain pictorial representations upon customers and concluded, contrary to the Commission's conclusion, that these pictures could not deceive the average purchaser. In that case, also, the Court noticed that "the record is practically bare of any evidence of actual reliance upon the puffing exaggeration of qualities," and said further, that "there was no basis for the finding that 'substantial numbers of purchasers had been misled and deceived.'" The same is true in the case at bar.

Even in other cases in the Seventh Circuit which decided the instant case, the court has contrasted evidence of the Commission with that of the Respondent, and on more than one occasion has decided that the great "weight" of the evidence was against the Commission's contentions. In *Kidder Oil Company* v. *Federal Trade Commission*, 117 Fed. 2nd, 892 (C.C.A. 7) the same court recognized that the question for decision was "whether the findings of fact as made by the Commission * * * are sustained by substantial evidence" and said, that

"a study of the Record is convincing that the overwhelming 'weight' of the testimony is contrary to the Commission's contentions." Indeed, the Court said, the Commission had the burden of conducting such tests and experiments "as would demonstrate, *at least to a reasonable certainty, the validity of the charge which it had the burden of sustaining.*"

The Court of Appeals, in the case at bar, seems to confuse the term "substantial evidence" with the term "substantial witnesses". As has been seen, whether or not the Commission's findings are sustained by substantial evidence depends upon a consideration and appraisal of all of the evidence in the record viewed in its entirety. If a single witness testified that he was standing on the corner of 14th and F Streets and saw a taxicab go through a red light and collide with a private car which had the right of way, the testimony of such witness would doubtless be substantial. But if fifty witnesses with equal or better opportunities for observation testified that the taxicab had the right of way, and that the private car "beat the light", would the testimony of the single witness constitute substantial evidence? Obviously the question as to whether or not the evidence for or against the contentions of a party litigant is substantial must, of necessity, depend upon the consideration and analysis of the entire record and such consideration implies that a judicial test be applied to its various parts and portions.

This Court should re-state its position upon this subject.

II.

There was no substantial evidence in the record, within the meaning of that term as presently defined by this Court, of the result of the use of the Vacu-Matic instrument when it was actually open and operating.

The fear of the court below of treading upon forbidden ground caused it to accept the contentions of the Com-

mission as to value of the testimony relating to the experiments conducted on behalf of the Commission. At the outset of this portion of the discussion it is necessary for the Court to bear in mind that over 200,000 Vacu-Matic appliances were sold to the purchasing public prior to 1940 (Rec. 194). Out of this large consumer field not a single purchaser testified to the fact that the instrument did not perform in accordance with the seller's claims. All who were called testified in favor of the device.

The court below said that the most convincing testimony relied upon by the Commission was that given as the result of tests made by the Bendix-Stromberg Company of South Bend, Indiana. The court said that every recognized test was made by the engineering department of this company. *The fact is that, contrary to the opinion of the court below, the tests conducted at South Bend did not demonstrate the result of the use of the Vacu-Matic when the instrument was actually open and operating.* It is admitted that the device opens and closes at different speeds and motor loads to permit the entrance of additional air into the combustion chamber of the motor. The Commission itself has conceded that "when the engine is accelerated the differential pressure changes, the spring expands moving the piston forward, the small round hole in the side of the cylinder and the oblong opening into the air passage are uncovered." (See also Rec. 192).

It is clear, therefore, that the Vacu-Matic remains closed and inoperative unless and until a sudden load is placed upon the motor by the pressure of the foot upon the throttle, or, in other words, until the engine is accelerated for increased speed, or to provide the extra pull necessary to overcome conditions found in everyday driving, such as starting from a dead stop, accelera-

tion of speed to pass other vehicles, overcoming the grade of hills, wind resistance or other circumstances *requiring intermittent demands for more power or speed.* Under all other conditions the Vacu-Matic remains closed. This is the vital fact which must be taken as the starting point of any actual or experimental use of the Vacu-Matic appliance.

It is impossible adequately to present the present application without briefly calling to this Court's attention the evidence appearing in the Record, all indisputably demonstrating the point that, in the experiments conducted by the Commission, the instrument was not subjected to the varying conditions which cause it to open and close and which are found in actual driving.

A. H. Winkler, Research Engineer at South Bend, testifying for the Commission as to the road test there conducted, said:

> "We have a measured mile and a car is run for the measured mile *at a constant speed* and the fuel flow in c. c.'s measured from which may be calculated the mile per gallon."

While Winkler testified that road tests were made at different speeds, it must be observed that *these different speeds were constantly maintained for each test,* the run being made for "the measured mile at a constant speed." The Vacu-Matic instrument opens during the period of time when the motor is achieving the required speed, or, more technically stated, the required revolutions per minute. When that point is attained the physical condition which causes the Vacu-Matic to open is met, and, once met and maintained, the instrument closes. It is hence apparent that the road tests at South Bend did not simulate ordinary driving with changing demands for power and acceleration.

The evidence at South Bend which impressed the court below also included dynamometer tests, but here, again, the Record is plain that these tests were also made at constant speeds and loads. The same witness, Winkler, said:

> "The engine was run at 400 R. P. M., 800, 1200, 1600, 2000, 2400, 2800, 3200 and 3600". (Rec. 532). 400 R. P. M. is roughly, 7 miles per hour by actual car speed, 800 approximately 15, and 1200 in the neighborhood of about 23 miles per hour."
>
> "The lower axis or the horizontal axis of 400, 800, 1200, 1600, 2000, 2400, 2800, 3200, and 3600, refer to engine speed." (Rec. 537).

These are constant speeds, and the Vacu-Matic, therefore, was closed and not operating because each R. P. M. setting was maintained at a constant speed with no acceleration. Winkler further said (Rec. 532):

> "In this test a *predetermined dynamometer load* was determined from manufacturer's specifications that is required for the engine at different car road loads. That load was applied to the engine for the various speeds, *a different load being made for each speed.*"

Winkler said, also:

> "The same load was applied to both units for a given speed." (Rec. 538).

As to the "Flow Bench Tests" conducted at South Bend, Winkler admitted that he did not know whether, at the time those tests were made, the valve was open or closed (Rec. 554).

All of this the court below failed to consider. In the tests conducted at South Bend, moreover, the surprising fact developed that with the Vacu-Matic installed there was an average saving in gasoline of 1½%, which saving was accomplished, not by the opening and closing of the

Vacu-Matic, but through leakage around its valve (Rec. 554). The Court of Appeals neglected to observe, also, that the carburetor used at South Bend in the 1941 Dodge with which the experiments were conducted was not a standard carburetor. For the purpose of the South Bend tests two different sized jets were installed in the carburetor, one for part throttle operation and one for full throttle operation. Commission's Exhibit 31-B (Rec. 836) recites:

> "From the above test series the correct main metering jet for part throttle operation is .058 and for full throttle operation .060. In all future tests it will be understood that an .058 main metering jet will be used for part throttle and an .060 main metering jet for a full throttle work unless otherwise specified."

On the face of the Record, therefore, it is obvious that that portion of the testimony designated by the court below as "convincing" cannot be regarded as possessing, in any true sense, the quality of substantiality.

III.

The Court of Appeals did not take into consideration the irreconcilable inconsistency in the evidence relied upon by the Commission to support the order under review.

While it is not within the bounds of propriety, perhaps, in these applications, to discuss at any length the evidence in the Record, counsel for Petitioner would be remiss in his duty if he failed to call to the attention of the Court a cross section or two of the testimony for the purpose of supporting Petitioner's point that there was utter inconsistency in the evidence submitted on behalf of the Commission.

The quality of substantiality presupposes consistency in the structure of the evidence which is said to support an order, judgment or decree. It is submitted that the court below overlooked the argument addressed to it by Petitioner in its briefs and upon the oral presentation which pointed out the irreconcilable inconsistency in certain important phases of the Commission's case.

D. B. Brooks (Rec. 88), testifying for the Commission, said that an adequate test of Petitioner's device and an adequate test of engine performance was best demonstrated by the "block test". Road tests, he said, *were comparatively valueless* (Rec. 88).

Bruce, Brook's assistant, while agreeing with his superior as to the inadequacy of road tests on his direct examination (Rec. 297), was found to have possessed a totally different view in other sworn statements of his (Rec. 321, 324).

Bruce arrived at the conclusion that the same results would be obtained by the use of the Vacu-Matic as are obtainable by an adjustment of the carburetor (Rec. 73). Brooks flatly disagreed with this conclusion (Rec. 89).

Ball, another Commission witness, contradicting Brooks, said that the road test was the test to determine economy (Rec. 750). Ball also said that a number of tests was necessary, thus disagreeing with Brooks as to the all-importance of the block test (Rec. 749).

Bruce's testimony envisaged an adjustability of the carburetor. Smith, another Commission witness, flatly stated that a carburetor is not adjustable (Rec. 431).

The Commission first rested its case on Brooks' assertion that the block test was conclusive but elected later to reopen and to attempt to submit the Vacu-Matic de-

vice to the road test, the dynamometer test and the flow bench test.

These are but a few of the inconsistencies apparent in the hundreds upon hundreds of pages of testimony which the Commission went to the expense of taking in the prosecution of this simple case against this relatively unimportant respondent to its complaint. It is respectfully urged that an examination of the whole Record disclosing, as it does, such irreconcilable inconsistencies, necessarily discloses, also, insubstantiality.

IV.

The findings and order of the Commission are inconsistent with the evidence.

The Court below did not perceive the inherent inconsistency between the Record, even as made by the Commission's evidence, and the order. By the same token, the order is not supported by the evidence to which the Court refers as being sufficiently substantial to justify affirmance. The order (Par. 2) (Rec. 930), directs Petitioner to refrain from representing,

> "that the use of Respondent's device on an automobile engine will result *in any reduction* in gasoline consumption or in any increase in mileage per unit in gasoline, unless such representation be expressly limited to those cases in which the fuel mixture, *due to improper adjustment* of the carburetor, is excessively rich. * * *"

The Stromberg tests which Winkler said he supervised, do not support this language of the order. He reported as has been said, "a 1½% increase in miles per gallon over the entire range as an average" (Rec. 563). This, it must be remembered, is without acceleration, with the Vacu-Matic closed and not in operation, and

from just the air leakage past the piston. Does a 1½% saving shown under such conditions entitle the Commission to state that the device will not result in *any* reduction in gasoline consumption or in *any* increase in mileage? Could a merchant who gives a 1½% cash discount be required to refrain from saying that he gives *any* discount? That portion of the Record upon which the Court particularly relies, instead of showing that there was no increase in mileage, *shows that there was an increase.*

The paragraph of the order which limited Petitioner's representations to those cases in which the fuel mixture, "due to improper adjustment of the carburetor, is excessively rich and a small amount of additional air may serve to lean such mixture", was predicated upon Paragraph Seven of the Findings as to the Facts (Rec. 928) which concludes with the language: "The same result could be obtained by proper adjustment of the carburetor." *According to the Commission's evidence, however, carburetors are not adjustable.*

Test after test was made at the Stromberg plant to find a jet which could be used in the carburetor to put it in the best possible adjustment for part throttle and for full throttle operation. It was found that no single, main metering jet could give the best adjustment under both of these requirements. This is apparent from the formal findings appearing in Commission's Exhibit 31-A to E, (Rec. 834), which assert that the regular Stromberg carburetor used on the 1941 Dodge was not efficient *because two different sized jets were required to get peak mileage and performance.* Commission's Exhibit 31-B (Rec. 836) recites:

> "From the above test series the correct main metering for part throttle operation is .058 and for full throttle operation .060. In all future tests it

will be understood that an .058 main metering jet will be used for part throttle and an .060 main metering jet for a full throttle work unless otherwise specified."

Thus, the 1941 Dodge was not a standard 1941 Dodge and its carburetor was not a standard carburetor. The carburetor used for the experiments was not "improperly adjusted." And it was not "excessively rich." It was taken apart, tested and re-tested for highest efficiency. The regular jet was removed and .058 jet put in for best results for part throttle work and a .060 jet for full throttle work. Obviously, a car owner could never obtain such efficiency with a standard carburetor.

An admission fatal to the Commission's case, is implicit in this evidence. The end-result being that the regular or standard carburetor on the 1941 Dodge could not give correct mileage at full throttle or high speeds with a .058 jet, or correct mileage at slow speeds with a .060 jet, it is apparent that whatever jet a car owner had in his carburetor, whether .058 or .060, he will always have a carburetor out of adjustment at one or the other speeds, or, in other words, at part throttle or full throttle operation. Concededly, a standard carburetor does not contain two main metering jets. This amounts to a complete demonstration that the standard Stromberg Carburetor is always incorrectly adjusted at one speed or another.

There is a further demonstrable inconsistency between the order and the evidence. Paragraph 2 of the order (Rec. 930) limits Petitioner's future representations to the statement that its device will not result in any reduction in gasoline consumption except in "those cases in which the fuel mixture, *due to improper adjustment of the carburetor,* is excessively rich and a small amount

of additional air may serve to lean such mixture." The Court below, in approving the order, did not take into consideration the fact that there is no adjustment, except the idling adjustment, on any carburetor. *The air bleed is fixed. The gas jet is fixed.* As has been seen the carburetor manufacturer did everything it could to make the carburetor efficient, even to the extent of using different jets for different speeds, (Rec. 836) a condition which, of course, could not be accomplished by an ordinary owner or operator of an automobile. Even with the actually redesigned and rebuilt carburetor, brought to the peak of efficiency, the Vacu-Matic showed a saving because of the air leakage past the piston. The manufacturer found that even the rebuilding of its carburetor and the use of different sized jets did not give as efficient results as were obtained with the Vacu-Matic *added but unopened.* The statement that "the same results could be accomplished by proper adjustment of the carburetor," is thus disproved.

That a carburetor cannot be adjusted is otherwise definitely established by the evidence which, it is believed, the Court of Appeals did not take into consideration in its opinion. The meaning of the word "adjusted" was stated in the testimony of Commission's witness, Harold L. Smith, as follows:

> "There is no case I know of where the air is adjusted, or can be adjusted at will by the user, let me put it that way. When you say adjusted, you mean any user can turn something and make a change, is that correct?
>
> "Q. That is right.
>
> "A. In the engineering sense we say a thing can be adjusted *if the manufacturer* could drill a hole larger or smaller when the thing is made, *but that isn't possible for the consumer* (Rec. 430).

"It is not left to the user to determine the size of the opening. They are not adjustable in any case I recall now of carburetors made in recent years" (Rec. 413).

The gas jet is also fixed. There is no method by which the gas can be increased or diminished at will by the user by the turning of a knob or screw, or by any other manipulatable device on the carburetor. The only means of changing the mixture in the flow of gasoline is by removing one jet and putting in one of different size.

Furthermore, Commission's witness Winkler said:

"Varying the main metering jet is accomplished in actual practice by taking the plug out, the ball of the main metering jet, removing the ball of the main metering jet and putting in a size larger or smaller, as the case may be" (Rec. 526).

The Court must not be confused by the fact that there is an "idling" adjustment on a carburetor. The idling adjustment is like the pilot light on a stove. It merely provides sufficient fuel to keep the motor going while the car itself is stationary or coming to a stop, with the throttle, which provides the fuel for propulsion, closed.

As all jets are fixed and not adjustable, the Commission completely failed to show evidence of any kind that a carburetor can be adjusted. *Therefore, the effect of the order is to require Petitioner, in its future advertisements, to state an impossibility.*

None of these substantial and indisputable circumstances was noticed by the Court below.

V.

The Court of Appeals erred in failing to hold that the Federal Trade Commission may not ignore and refuse to make a finding on material facts appearing in the record.

The Court is respectfully urged to bear in mind in its consideration of this case that the Commission introduced no evidence whatsoever to the effect that the Vacu-Matic device on ordinary cars in ordinary condition, driven by ordinary drivers and used in day-in and day-out driving, does not substantially perform according to the seller's representations.

This Record reveals, as has been said, that over 200,000 of Vacu-Matic appliances were sold to the public by the year 1940. The Commission, with its vast investigatory powers, produced not a single customer to support its claim that Petitioner's advertising statements deceived, or had the tendency to deceive, an actual purchaser. The Commission called three customer witnesses, C. D. Sober, Frank Engelhaupt and W. J. Anttila. Sober's testimony was completely in Petitioner's favor (Rec. 120, 122). Engelhaupt said that they had used the device for about 2½ years (Rec. 123-124); that the instrument was wholly satisfactory and that on a 300 mile trip he used 22 gallons of gasoline with the Vacu-Matic while before its use he consumed 32 gallons for a 300 mile trip. Anttila wrote an unsolicited letter of recommendation to Petitioner stating that he had used the device for upwards of six years and that his saving of gasoline was represented by the fact that before he installed the Vacu-Matic he was getting from 11 to 12 miles on a gallon and after its installation he got 15 to 16 miles per gallon (Rec. 126). *These were the Commission's witnesses and the only customer witnesses called by the Commission.*

Petitioner called eight actual users. Arthur K. Brasted testified to a gain of three miles to the gallon with the Vacu-Matic (Rec. 146). Ruben O. Obermeyer (Rec. 153) corroborated Brasted's testimony. Earl Racine (Rec. 149, 150), Roy Seibel (Rec. 157-159), Leroy O'Gorman (Rec. 160, 161), John J. Schmit (Rec. 163), Herman Mueller (Rec. 180), and Herbert Bahr (Rec. 185-186) all similarly testified to notable savings in gasoline consumption after the installation of the Vacu-Matic.

No finding upon, not even an allusion to, this testimony appears in the findings of the Commission. The court below sidestepped this remarkable condition of the Record by the back-handed statement, "On the other hand, the Commission introduced no testimony from any purchaser and user of Petitioner's device who testified to the contrary, notwithstanding the fact that more than 200,000 had been sold to the purchasing public prior to 1940." (157 Fed. 2nd at p. 713).

Contradicted by its own witnesses who testified to actual use and from practical experience, the Commission was reduced to seeking support for its claims against Petitioner in the so-called expert testimony, some based upon tests in which the device was not open and operating and some predicated upon opinion which had no foundation in any actual experimentation. It may not be amiss to observe that, on occasion, even these so-called experts called by the Commission testified adversely to the Commission's position. Such, for example, was Thomas M. Ball, Engineer for the Chrysler Corporation (Rec. 727) who said:

> "To state positively what the device does, or does not, do, I certainly would have to conduct tests outlined a moment ago."

These tests, he said, contemplated both block tests and road tests (Rec. 749). He completely supported Petitioner's contention that the Vacu-Matic instrument was not subjected to any test which required it to open and operate, when he said (Rec. 749):

> "A single block test gives certain definite information. Neither tests tell exactly what the consumer would benefit by the use of the device * * * *because both tests are more or less in constant speed and load conditions and that is not the way the car is driven.*"

Ball's testimony establishes the value of the testimony of the customer witnesses who did use the device "the way the car is driven." It would seem to be self-evident, therefore, that the Commission should have made a finding based upon evidence, the practical value of which is undeniable, according to one of its own, principal, expert witnesses.

This Court has announced the rule on the subject. In *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, this Court said at page 580:

> "But, as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, *the Court must also have power to examine the whole record* and ascertain for itself the issues presented and *whether there are material facts not reported by the commission.* If there be substantial evidence relating to such facts *from which different conclusions reasonably may be drawn*, the matter may be and ordinarily, we think, should be, remanded to the commission—the primary fact-finding body—with direction to make additional findings; but if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do." (Italics supplied)

Certainly in the case at bar there was substantial evidence relating to the fact that the customers were not deceived. Indeed the affirmative circumstance was established that the Vacu-Matic device, in ordinary driving, performed according to the representations made for it. Certainly, also, this was evidence from which a different conclusion could reasonably be drawn, and if the opinion of this Court in the *Curtis Publishing Company* case is to be respected, the Commission erred in failing to make a finding thereon and the court below erred in not noticing and correcting the Commission's error.

VI.

The Court of Appeals erred in approving, under the condition of the record before it, the finding that petitioner's representations possess the tendency to mislead a substantial portion of the purchasing public and in holding that doubtful proof of the tendency to mislead may be considered as sufficient in the face of unanimous testimony by the customers themselves that they were not deceived and that the device operated as represented.

The amended complaint charged that the use by the Respondent of its advertising statements "has the tendency and capacity to, and *does mislead and deceive* a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of substantial quantities of respondent's product, as a result of the erroneous and mistaken belief so engendered." (Rec. 34).

No finding was made by the Commission, and one could not be in the face of the evidence to the contrary, that any buyers were misled into the purchase of substantial

quantities of Petitioner's device. The charge was, therefore, abandoned, the Commission relying upon an alleged tendency to deceive. The presence of such tendency may be inferred, the Commission successfully argued, from the result of the tests and of the opinions of its expert witnesses. The Court below characterized these Commission's witnesses as "highly trained and qualified experts" (Rec. 173), but the Record discloses that, even as to the mechanics who conducted the operations at South Bend, the educational background of one was a commercial course in Montreal (Rec. 623), another was a flow box operator for the Bendix-Stromberg Company for thirteen months prior to which "he was a substitute clerk in the Post Office (Rec. 67) and another had no training or experience in engine testing previous to his employment by the Stromberg Company (Rec. 701). Still another witness who was employed by the Better Business Bureau had some training in engineering but his work for the Bureau was in connection with the Merchandising Division (Rec. 391). This "expert" also acted "as insurance adviser for the County Relief Committee" (Rec. 467). Although these circumstances were called to the attention of the Court of Appeals, the Court ignored the suggestions.

All of the tests to which the Vacu-Matic appliance was subjected were made for the express purpose of demonstrating, not its efficiency, but its inefficiency, and to achieve this result, the experiments were conducted on stationary Ford motors, by dynamometers, flow boxes and with specially equipped carburetors. In view of the testimony of Commission's witness Thomas M. Ball, as has been seen, none of these tests was either practical or fair and none was conclusive because all were made "in constant speed and load conditions", and *that* he said, "is

not the way the car is driven" (Rec. 749). This testimony was not denied by any witness. Thus the Commission's evidence supports Petitioner's contention that the Bendix-Stromberg tests at South Bend did not demonstrate the Vacu-Matic instrument when it was open and operating.

Furthermore, proof of deception, or even proof of the tendency, to deceive, could be found, if it existed, in the vast field of customer witnesses who drove cars, to paraphrase Ball's testimony, 'as cars are driven'. The cross section of the customer field of facts which appears in the testimony of both the Commission's and Petitioner's witnesses removed the questionable existence of a tendency to deceive from consideration. Here was practical and undisputed evidence positively negativing both the existence of actual deception and the tendency to deceive.

In view of the presence in the Record of this affirmative testimony, all conjecture as to the tendency to deceive is eliminated from consideration. The case thus moved from the doubtful area of "tendencies" into the definite field of actuality.

Insofar as the opinion evidence of the Commission is concerned, the applicable rule of procedure needs no long list of authorities for its support. When a physical fact is ascertainable and demonstrable by actual observation, opinions as to what that fact is are not admissible. Opinion is called upon only where an issue of fact cannot effectively be proved in any other way.

In "Opinion Evidence in Illinois," King and Pillinger, at page 322, the authors say:

> "It is usually clear that a conclusion derived from reasoning has scant weight against the direct testimony of eye witnesses to the contrary, despite the fact that such direct testimony contains inferences

> or conclusions. Thus, in a suit against a railroad for flooding land because of the alleged inadequacy of a culvert under its right-of-way, several civil engineers testified that according to the principles and formulae of good engineering the opening under the bridge was twice the capacity required to carry all the water. But the Court said that these opinions could not prevail against the testimony of witnesses to their personal knowledge and observation of the fact that the opening was not sufficient." (Referring to *Chicago M. & St. P. RR. Co.* v. *Carpenter,* 125 Ill. App. 306.)

An owner of a house, expert though he may not be, is, better than an expert, able to say from constant and actual use whether the installation of a coal stoker in his furnace saves or does not save coal.

This Court should announce the rule as to whether or not it was proper to consider as conclusive, an alleged tendency to deceive in the face of the undisputed record, made by every customer called to testify, that there was no deception.

VII.

The Court of Appeals erred in holding that petitioner received a fair trial before the Commission.

The case reached its final result before the Commission after six years of proceedings and some eight years after the Commission commenced its original investigation. During that time Petitioner was hailed from Milwawkee to Washington, from Milwaukee to Chicago, back to Washington, back to Chicago and to Indianapolis, Indiana. On the comparatively simple issue some 1500 pages of testimony were taken, most of them by the Commission. In that long record appear practices and rulings which are violative of the most fundamental concepts of the rules and standards of fair trial and fair play.

This Court has repeatedly announced the standard of procedure which must be observed by administrative agencies in the exercise of their judicial function.

In *Morgan* v. *U. S.*, 304 U. S. 1; 82 L. Ed. 1129, Mr. Chief Justice Hughes, who delivered the opinion of Court, in speaking of an administrative inquiry before the Secretary of Agriculture said, at page 19:

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

Concluding his opinion, the Chief Justice said, at page 22:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of highest importance and in no way cripples or embarrasses the examiners of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Justice Cardozo, in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 290; 81 L. Ed. 1095, said, at page 304 of the opinion:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their influence, and expert judgment exacts and receives a proper deference from Courts *when it has been reached with due submission to Constitutional restraints.* * * * There can be no compromise on

> the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (Italics supplied.)

Speaking of the Federal Trade Commission, the Court, in *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468, (C. C. A. 2), said:

> "The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the roles of complainant, jury, judge, and counsel. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy; but we regard the methods pursued in showing Proper's Diminution in Sales as lacking in every evidential or testimonial element of value, and opposed to that sense of fairness which is almost instinctive."

It is sometimes said that the proceedings and orders of administrative tribunals should be treated with broad liberality. (Most frequently this thought is expressed by the tribunals themselves). But the comparative youth of these agencies and the exuberant use which they make of their powers render it all the more necessary that they observe rules of fair play which are ingrown into our system of jurisprudence. As the Supreme Court said, in *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93; 57 L. Ed. 431:

> "But the more liberal the practice in admitting testimony, *the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.* In such cases, the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted, or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its right or make its defense. In no other way can it test the sufficiency of the facts

to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." (Italics supplied)

At another place in its opinion (p. 91), the Court said:

"A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Mr. Justice Frankfurter, before his elevation to the Supreme Court bench, in an article appearing in 75 University of Pennsylvania Law Review 614, 618, entitled "The Task of Administrative Law," said:

"Because of the danger of arbitrary conduct in the administrative application of legal standards (such as 'unreasonable rates', 'unfair methods of competition,' 'undesirable residents of the United States') our administrative law is inextricably bound up with Constitutional law. * * * But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that in the development of our liberty insistence upon procedural regularity has been a large factor), easy access to public scrutiny and a constant play of criticism by an informed and spirited bar."

Only one of Petitioner's criticisms of the Commission's trial procedure was noticed by the Court of Appeals and this was that the case had been heard before five different trial examiners. The Court said that this practice was subject to criticism (p. 714) but that Petitioner did not point out how it affected the result or deprived Petitioner of a fair trial.

Hearings were conducted at Milwaukee and Washington, in 1938 by Examiner Hornibrook; at Milwaukee and Chicago in 1939, by Examiner Thomas; in Milwaukee in 1940 by Examiner Furnas; in Washington in 1940 by Examiner Preston; in Chicago in 1940 by Examiner Thomas and at Indianapolis, Indiana by Examiner Lewis. Examiner Furnas heard the testimony of all of the eight witnesses testifying for Petitioner (Rec. 144-181). Examiner Thomas heard all of the testimony of the customer witnesses called by the Commission (Rec. 119-126). Furnas heard the testimony of Petitioner's most important witness, Arthur S. Klopf (Rec. 129). Still another examiner heard the testimony of Bruce and Brooks as to the block tests conducted for the Commission, but this examiner did not sign either the Original or Supplemental Examiner's Report (Rec. 892-913).

Under any ordinary concept of legal procedure, it is necessary to relate the hearings one to the other, and to consider the record as a whole. What the conclusions of fact of a single trial examiner would be, who had before him the entire record, including the testimony offered by Petitioner, it is now impossible to say. Any chance of reasonable uniformity in ruling on the evidence is lost with the repeated substitution of hearing officers. It is not feasible, from the cold record, to isolate all of the points or places in the evidence where a party litigant has been adversely affected by such patchwork procedure.

Each Examiner is designated as the eyes and ears of the Commission. Each is separately impressed with the witnesses he particularly observes and hears. Each perceives the demeanor of the witnesses testifying before him. Typical of one of the practical results of this situation is the occasion when one of the Examiners admitted that he was somewhat handicapped as to the points raised by counsel and, therefore, he allowed a witness to answer a question to which there had been a strong objection (Rec. 231).

When an ordinary trial commences, whether it be before a legally constituted court or before an administrative body, the parties, for the benefit of the hearing officer, state their respective positions and theories so that some pattern can be followed during the course of the hearings. When the evidence is voluminous and sometimes cumulative, one examiner will be found making rulings of one kind and a subsequent examiner, unfamiliar with the rulings of his predecessor, may make rulings to the contrary. Whether or not evidence may be properly admissible at a given time, may depend upon what took place at some previous hearing. Consistency and uniformity where examiners walk in and out of the case during its progress, are impossible.

If the practice of substituting trial examiners is wrong, as the court below admits, it should not be necessary for the defeated party to demonstrate exactly how he was harmed. If the practice be condemnable then, for purposes of uniformity and for procedural institutionalization, it should be condemned. To sanction the practice in one case and to condemn it in another upon the uncertain ground that in one case the error might have been prejudicial and in the other not, does not contribute to an "adequate technique of administrative application of legal standards."

The Court of Appeals for the Seventh Circuit, in *Buchsbaum & Co.* v. *Federal Trade Commission,* 153 Fed. 2nd, 85 (CCA 7th, May 6th, 1946) held that the respondent to a Commission's complaint should have been granted a trial *de novo* as to all evidence taken before an examiner who had died and was replaced. In essence, the instant case falls directly within the reasoning of the Court in the *Buchsbaum* case. As has been said, the first and very important evidence in the case at bar was taken before Trial Examiner Hornibrook, and Hornibrook did not sign either of the reports. Not one of the Examiners who did sign the report or reports saw or heard the testimony admitted before Hornibrook.

It would seem to be obvious that this Court should rule upon this subject.

In the course of the proceedings some so-called experts were allowed to testify as to opinions drawn from tests conducted by others. Commission's witnesses Brooks (Rec. 77-87); Winkler (Rec. 516, 571-574). Some Commission's witnesses were permitted to give opinions based upon the opinions of other witnesses, they who gave their opinions having had doubtful information, if any, upon which to testify as experts. (Commission's witnesses Smith (Rec. 394-420), Kapps (Rec. 484-511). Some of the Commission's witnesses had never even seen the instrument except upon taking the witness stand, or shortly prior thereto. Nevertheless, they proceeded to give opinions. (Commission's witness Smith (Rec. 420); Gebhardt (Rec. 597); Mock (Rec. 587); Knocke (Rec. 757) and Shepard (Rec. 769)). Some of the witnesses testified from a previous reading of a portion of the Record called to their attention by the Commission. (Commission's witness Kapps Rec. 484, 493; Smith, Rec. 415).

One of the sharpest examples of the departure from the obligation "to preserve the essential rules of evidence by which rights are asserted or defended" (227 U. S. 88, 93) appears in connection with the testimony and exhibits as to the tests conducted at South Bend upon which the Court of Appeals so strongly relied. In the report by Mr. Winkler, Commission's Exhibit 31-A (Rec. 834-839), the conclusions are predicated on charted curves which appeared in accompanying graphs or figures. These calculations were made with the aid of an arbitrary formula or constant. Knowledge of higher mathematics is not required to understand that a result achieved by the application of any constant, formula, rule or equation must depend upon the demonstrable accuracy of such constant, formula, rule or equation. *Yet the undisputed testimony is that the witness who used the constant as a starting point was unable to say whether or not it was correct.* (Rec. 617). The formula was obtained from a friend who had worked out a series of constants which the witness started with as an arbitrary figure. He was asked, "in other words, you merely took the figures from these sheets, 41-A to F, for identification, and plotted the curves with those figures". The witness answered, "right". Then he was asked, "whether those figures are correct or not, you don't know, because you didn't get the figures yourself?" He answered, "That's right". The same unidentified 'constant' was used throughout the exhibit (Rec. 60). *No attempt was made by the Commission to show the accuracy or acceptability among engineers of this so-called "constant" by means of which the whole foundation of the evidence principally relied upon by the court below depended.*

It is respectfully suggested that this Court issue a word of admonition to the effect that proof by the Com-

mission of its complaint by such means does not comply with the requirements as to "the maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial function. (*Morgan* v. *United States*, 304 U. S. 1) Such methods of proof do not show due submission to constitutional restraints and do not fulfill the "minimal requirement" of proof which "exacts and receives a proper deference from Courts." *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 290.

As this Court has said:

> "• • • the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.)

CONCLUSION.

With deep conviction it is urged that the issuance of the Writ of Certiorari in this case is necessary, not only to review and correct the result achieved in the case at bar by means insupportable in law, but, also, to prevent the recurrence of similar instances of procedural irregularity and similar instances of unfair, unsupported and unlawful injunctive orders by federal agencies such as The Federal Trade Commission.

The instant application involves important and, as yet, undetermined problems both of substance and procedure which this Court should examine and solve.

Respectfully submitted,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Federal Trade Commission v. *S. Buchsbaum & Company*, 328 U. S. 818 8

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 5

Statute:

Federal Trade Commission Act, 38 Stat. 717, Sec. 5, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45 2

737843—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1078

VACU-MATIC CARBURETOR COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 950) is reported in 157 F. 2d 711.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 6, 1945 (R. 996), following its denial of a petition for rehearing (R. 995). The petition for a writ of certiorari was filed on February 28, 1947. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended.

QUESTION PRESENTED

Whether the evidence supports the findings of the Federal Trade Commission that representations made by petitioner with respect to its Vacumatic device were erroneous and misleading and constituted unfair and deceptive practices in commerce in violation of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *
>
> (c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

The Federal Trade Commission issued a complaint charging petitioner with violating Section 5 of the Federal Trade Commission Act by making false and deceptive representations in the sale of its product which tended to mislead the purchasing public (R. 31–35). After a hearing the Commission made the following findings:

Petitioner is engaged in the manufacture and sale of a mechanical device, called the "Vacu-

matic", which is attached to an automobile engine between the carburetor and the intake manifold.[1] To induce sales petitioner has represented in advertisements and by other means that the use of its device results in quicker starting, faster acceleration, more power, a smoother-running engine, and a substantial reduction (up to 30%) in gasoline consumption (R. 924–926). Tests of the device, conducted in accordance with recognized engineering standards by the National Bureau of Standards and a leading manufacturer of carburetors, establish that the device serves no useful purpose in the carburetion of gasoline in an automobile engine and has no appreciable effect upon the operation of an engine except that with respect to improperly adjusted carburetors in which the fuel mixture is excessively rich the amount of additional air admitted by the Vacumatic, though negligible when compared with the total amount of air used by the motor, may serve to "lean" the mixture and thereby reduce to some

[1] The device consists essentially of a small cylinder containing a piston which rests on a spring. The piston, operated by the differential pressure between the intake manifold and the atmosphere, moves within the cylinder to open and close a small hole which permits additional air to enter the intake manifold. Petitioner claims that the admission of this additional air at the proper time causes less gasoline to be drawn from the carburetor and, additionally, that the manner of admission increases the "turbulence" (swirl of air) within the motor causing a more explosive and efficient mixture of gasoline and air (R. 926).

extent the amount of gasoline consumed. The conclusion derived from such tests is supported by the opinion of experts in the automotive and carburetor engineering fields. (R. 926–928.)

Petitioner relies principally on certain road tests which, if authoritative, would indicate that use of the device reduces gasoline consumption. It is doubtful that road tests can be accepted at face value. Engineers generally recognize them as less reliable than laboratory tests because of inability to control to the same degree such variable factors as temperature, barometric pressure, humidity, wind resistance, road conditions, density of traffic, and the manner in which the automobile is driven. Included in the tests made by the Bureau of Standards and the carburetor manufacturer were road tests, the results of which supported the laboratory tests. (R. 927.)

The Commission concluded that petitioner's representations were erroneous and misleading and that its practices constituted unfair and deceptive practices in commerce within the meaning of the Federal Trade Commission Act (R. 928). Upon these findings the Commission ordered that petitioner cease and desist from representing that the Vacu-matic or any similar device, when used on an automobile engine, would result in the claimed advantages such as quicker starting or increased power, or would perform any useful service in the carburetion of gasoline,

unless the representations were expressly limited to a possible reduction in gasoline consumption in cases in which, due to improper carburetor adjustment, the fuel mixture was excessively rich (Order, R. 929–930).

ARGUMENT

The petition presents no question of sufficient substance to merit review by this Court. Though petitioner casts the alleged errors of the Circuit Court of Appeals in various forms, its sole complaint, with a minor exception, is that the court erroneously ruled that the findings of the Commission were supported by substantial evidence. Certiorari will not be granted, in the absence of unusual circumstances, merely to review questions of fact. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

We submit that the Commission's findings are not only supported by substantial evidence, but are clearly required by the evidence. Exhaustive tests of petitioner's device were made both by the National Bureau of Standards and Bendix Stromberg Carburetor Company, with results substantially similar in establishing that petitioner's device was of no appreciable value of itself and incapable of producing the results which petitioner claimed for it in its advertising campaign (R. 819–821, 834–839). Contrary to petitioner's claims, these tests were made while the device was

open and operating and in such a manner as to determine fully its potentialities (R. 821, 830–831, 837–838).

Eight automotive engineers of experience and standing testified on behalf of the Commission, including such experts as the engineer in charge of the Carburetor Laboratory of the Chrysler Corporation, the assistant chief engineer of the Dodge Division of Chrysler Corporation, and the engineer in charge of the design and operation of all carburetors used by Chevrolet Motor Company (R. 727, 754, 769). A typical example of the testimony of these experts is that given by the engineering executive in charge of carburetion for the Stromberg Division of Bendix. When shown a Vacu-matic device, he testified that it was quite an old idea,[2] that devices similar to the Vacu-matic had been presented to him for experimentation over an 18-year period; that he had tested them repeatedly and found they would do just what science and engineering analysis would indicate, and that the Vacu-matic was practically valueless (R. 579–592).

In behalf of its position, petitioner offered only the opinion evidence of a few users and its own officials, based on unreliable tests (R. 144–187; 351–381), and the result of one scientific test con-

[2] Other expert witnesses testified to a long familiarity with devices similar to the Vacu-matic which they denominated "manifold air-bleeds" (R. 488–489, 598, 741, 765, 790).

ducted by an automotive engineer (R. 129–143, 869). This was a road test and the evidence indicated beyond doubt that tests made under laboratory conditions are far more reliable in determining the performance of petitioner's device. An expert of the Bureau of Standards, the author of several published papers on the relative accuracy of tests of automotive engines (R. 256), testified that the limits of experimental error of the test conducted by petitioner's lone expert would be about 10 percent, and that such limits as to the tests referred to by petitioner's other witnesses would be about 20 or 30 percent, except for one test which might be correct within 10 or 15 percent. (R. 270.)[3]

Since petitioner also urges that the hearing before the Commission violated the most fundamental rules of evidence and the most fundamental concepts of fair play (Pet. 28), we think it appropriate to notice, for illustrative purposes,

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[3] This expert, with some 16 years experience in testing and research work in automotive laboratories, testified that the precision of a laboratory test is approximately ten times as great as a road test, that that means an average taken from 100 road tests would have a value equal to one laboratory test (R. 241), that these figures in comparing the precision of laboratory and road tests were not arbitrary figures but were the results of statistical analysis and "the summation of * * * approximately 20 years of testing in the laboratory and on the road, and comparing the extent to which supposedly identical tests agree in results" (R. 253–256). Petitioner's lone expert agreed that a laboratory block test "is the most accurate test of all" (R. 140).

what petitioner characterizes as "one of the sharpest examples" of the asserted failure to preserve essential rules of evidence (Pet. 61). It is asserted that the tests made of the Vacu-matic device by the Carburetor Company were computed with the aid of a formula or constants with no attempt to show their correctness and as to which the witness who used them as a starting point was unable to say whether or not they were correct. In fact, the "constants" are conversion factors used to convert fuel consumption in time into mileage realized per gallon of gasoline. These constants, serving simply to shorten mathematical calculations, had been developed at the Carburetor Company to perform the conversion function and were in constant, routine use. There was no evidence to suggest that the constants were inaccurate; if they were, their inaccuracy would not affect the tests since the same constants were used to convert the results of engine operation with and without the Vacu-matic device. Moreover, the unconverted results remained available (R. 522, 524, 602–605, 617–620).

Petitioner's contention that the substitution of examiners resulted in denial of a fair hearing was first raised upon appeal; it made no objection to the procedure before the Commission and in fact consented to the last substitution (Comm. Exs. 52, 53, unprinted; R. 954). *Cf. Federal Trade Commission* v. *S. Buchsbaum & Company,* 328 U. S. 818.

CONCLUSION

The decision below is correct and not in conflict with the decision of this Court or of any other circuit court. No question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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